

# Introduction to Section 106 of the National Historic Preservation Act



GSA Region 10 – Northwest/ Arctic  
June 22- 23, 2004

Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE <b>01 AUG 2004</b>		2. REPORT TYPE <b>N/A</b>		3. DATES COVERED <b>-</b>	
4. TITLE AND SUBTITLE <b>Introduction to Section 106 of the National Historic Preservation Act</b>				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>GSA Region 10 Northwest/ Arctic</b>				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release, distribution unlimited</b>					
13. SUPPLEMENTARY NOTES <b>See also ADM002111. Department of Defense Conservation Conference. Held in Savannah, Georgia on August 22-27, 2004, The original document contains color images.</b>					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT <b>UU</b>	18. NUMBER OF PAGES <b>113</b>	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			

# Preserving Our Nation's Heritage



## Mid 19<sup>th</sup> c. Ann Pamela Cunningham: Mount Vernon Ladies Association



**1853:** Office of the Supervising Architect is established in the Treasury to design and construct civilian federal buildings.

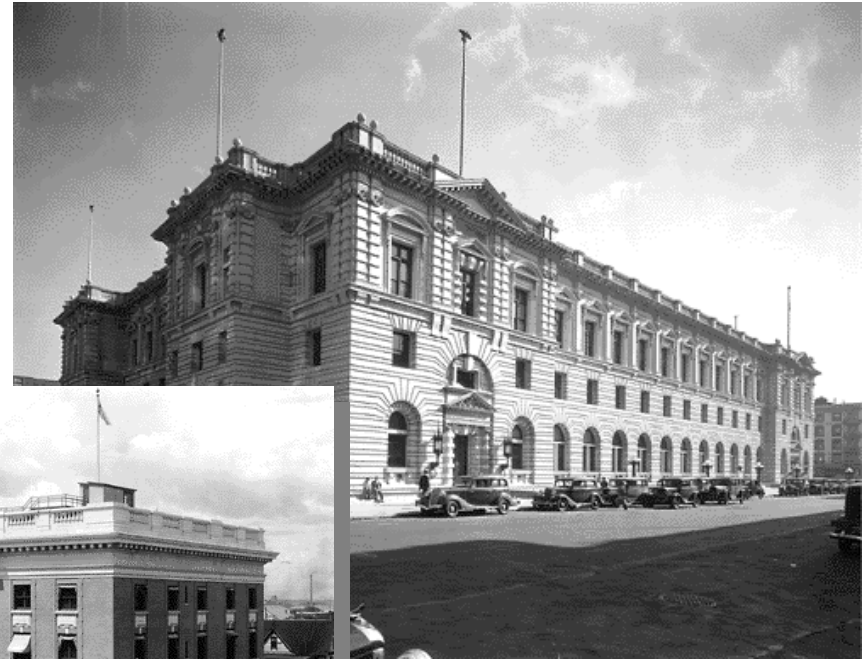
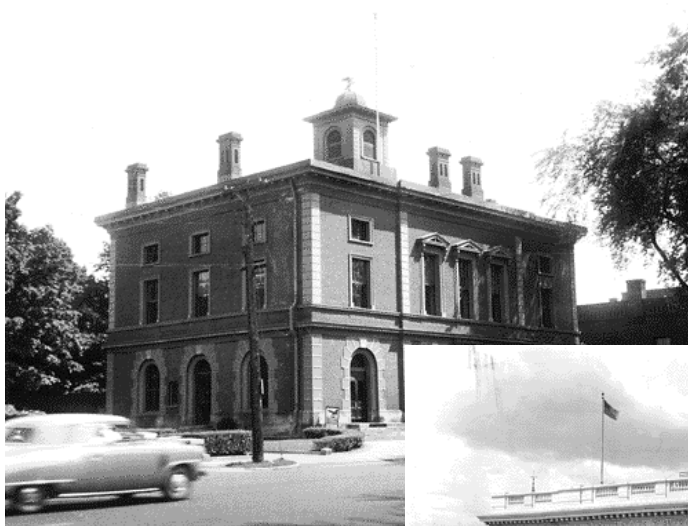


## 1908: The Antiquities Act: First legislation protecting our national heritage.





Office of Supervising Architect was the Largest architectural practice in the nation. Designed hundreds of federal buildings.



# 1935: Works Progress Administration

- 115,000 Federal Buildings constructed
- Tennessee Valley Authority





**1947:** The National trust for Historic Preservation is created



**NATIONAL TRUST**  
*for* HISTORIC PRESERVATION™

**1948:** GSA is created as a procurement and service agency.



Goal was to  
standardize  
procurement  
practices and  
provide uniformity

## Urban renewal of the 1950s - 60s



# Guiding Principles for Federal Architecture - 1961



*“The policy shall be to provide...facilities in an architectural style and form which is distinguished and which will reflect the dignity, enterprise, vigor, and stability of the American National Government. Major emphasis should be placed on the choice of designs that embody the finest contemporary American architectural thought....”*

# Post-War Federal Buildings



Cultural climate dominated by Operations Research, Quantitative Systems Analysis, Efficiency Studies, etc.

A/E Selection criteria increasingly focused on issues not related to architectural quality.







# **Understanding the Intent of the National Historic Preservation Act (NHPA) of 1966**

- Promote Federal Agency Preservation stewardship Programs (Section 110 and 111)
- Refine the National Register of Historic Places nomination process
- strengthen Federal Preservation protection Process (Section 106)
- Create an Administrative supervisory Structure (ACHP)
- Create Financial preservation Incentives (e.g., funding of SHPO/THPOs; grants for preservation)

# Section 110 of the National Historic Preservation Act



**[16 U.S.C. 470h-2]**

# GSA responsibilities under Section 110

- ◆ Responsible to nominate eligible properties to the National Register .
- ◆ Consult with SHPO/THPOs, Native American groups, and the Council to minimize adverse effects of Federal activities on historic properties.
- ◆ Establish procedures for preparing Building Preservation Plans (BPP) for Register and register eligible properties.
- ◆ Investigating proposed sites for construction of federal buildings to identify historic or culturally significant properties.
- ◆ Agency must have a Federal Preservation Officer (FPO) who is responsible for coordination of cultural resource management and compliance with NHPA.

# Section 111 of the National Historic Preservation Act



**[16 U.S.C. 470h-3]**

# GSA responsibilities under Section 111

- GSA is responsible for seeking adaptive use of historic properties not currently needed for Federal agency purposes.
- Solicitation and selection procedures for leasing GSA controlled historic property for non-Federal use shall give preference to those with viable mechanisms for their protection (i.e. financial, past experience and commitment)
- All leases shall contain terms and conditions to ensure consistency with Federal Preservation standards.
- The RHPO shall be consulted in the development of historic building lease solicitations, RFQs, marketing strategies, and selection criteria.
- A sublease, assignment, amendment or encumbrance of any lease issued under 111 must be approved by RHPO, Regional counsel and Portfolio Manager.





# EXECUTIVE ORDERS



- ◆ EO 13006
- ◆ EO 11593
- ◆ EO 13287
- ◆ EO 12512

## GSA Policies and Directives applicable to Historic properties

- ◆ *GSA real Property Policies Final Rule* (41 CFR Parts 102-71, et al.) [December 13,2002]
- ◆ GSA Administrative Directive (ADM) 1020.2 : *GSA Procedures for Historic Properties* [October 19,2003]
  - RHPO Responsibilities

# Section 106 of the National Historic Preservation Act



**[16 U.S.C. 470f]**

# 36 CFR Part 800

## *Protection of Historic Properties*



# Requirements of Section 106

[16 U.S.C. 470f; 36 C.F.R. part 800]

Prior to taking action on an undertaking, Federal agencies must:

- Take into account the effects on **historic properties**; and
- Afford the Advisory Council on Historic Preservation a **reasonable** opportunity to comment



## Part 800 – protection of historic properties



- ◆ Subpart A – Purposes and Participants [800.1 - 2]
- ◆ Subpart B – The Section 106 Process [800.3 - 13]
- ◆ Subpart C – Program Alternatives [800.14 - 16]



# Subpart A – Purpose and Participants

## [Section 800.1-2]



# Federal Agency Official [800.2(a)]



# **WHO** are the consulting Parties? [800.2(c)]

- ♦ STATE HISTORIC PRESERVATION OFFICER
- ♦ TRIBAL HISTORIC PRESERVATION OFFICER
- ♦ INDIAN TRIBES/NATIVE HAWAIIANS/ ALASKA NATIVES
- ♦ ACHP
- ♦ NATIONAL PARK SERVICE
- ♦ PROJECT APPLICANT
- ♦ LOCAL GOVERNMENT
- ♦ public

# State Historic Preservation Officer [800.2(c)(1)]



North Carolina

State Historic Preservation Office

Department of Cultural Resources  
Office of Archives and History

# Tribal historic preservation officers (THPOs) [800.2(c)(1)(a)]



# Indian Tribes and Native Hawaiian Organizations

## [800.2(c)(2)]





# Advisory Council on Historic Preservation [800.2(b)]



# National Park Service





# Project Applicant

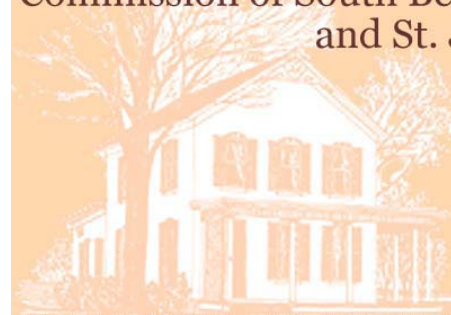


- ◆ Applicants for federal Assistance, permits, licenses, and other approvals are entitled to consult.
- ◆ Project developer (lease/build, ground lease, transfer)
- ◆ Project contractor
- ◆ tenants

# Representatives of Local Governments [800.2(c)(3)]

Although Federal actions are not required to comply with local restrictions governing new construction or building alteration, GSA policy is to consult and cooperate with local government planning commissions.

## The Historic Preservation Commission of South Bend and St. Joseph County Indiana



Homepage  
Indiana Map  
St. Joseph County Map  
South Bend Map

"People cannot maintain their spiritual roots and connections with the past if the physical world they live in does not also sustain those roots."

*—Christopher Alexander in "a Pattern of Language"*



# The Public [800.2(d)]

- Public opinion is essential to informed federal decision-making
- Regulations allow federal agencies to use their in-house procedures for seeking public input such as under NEPA.

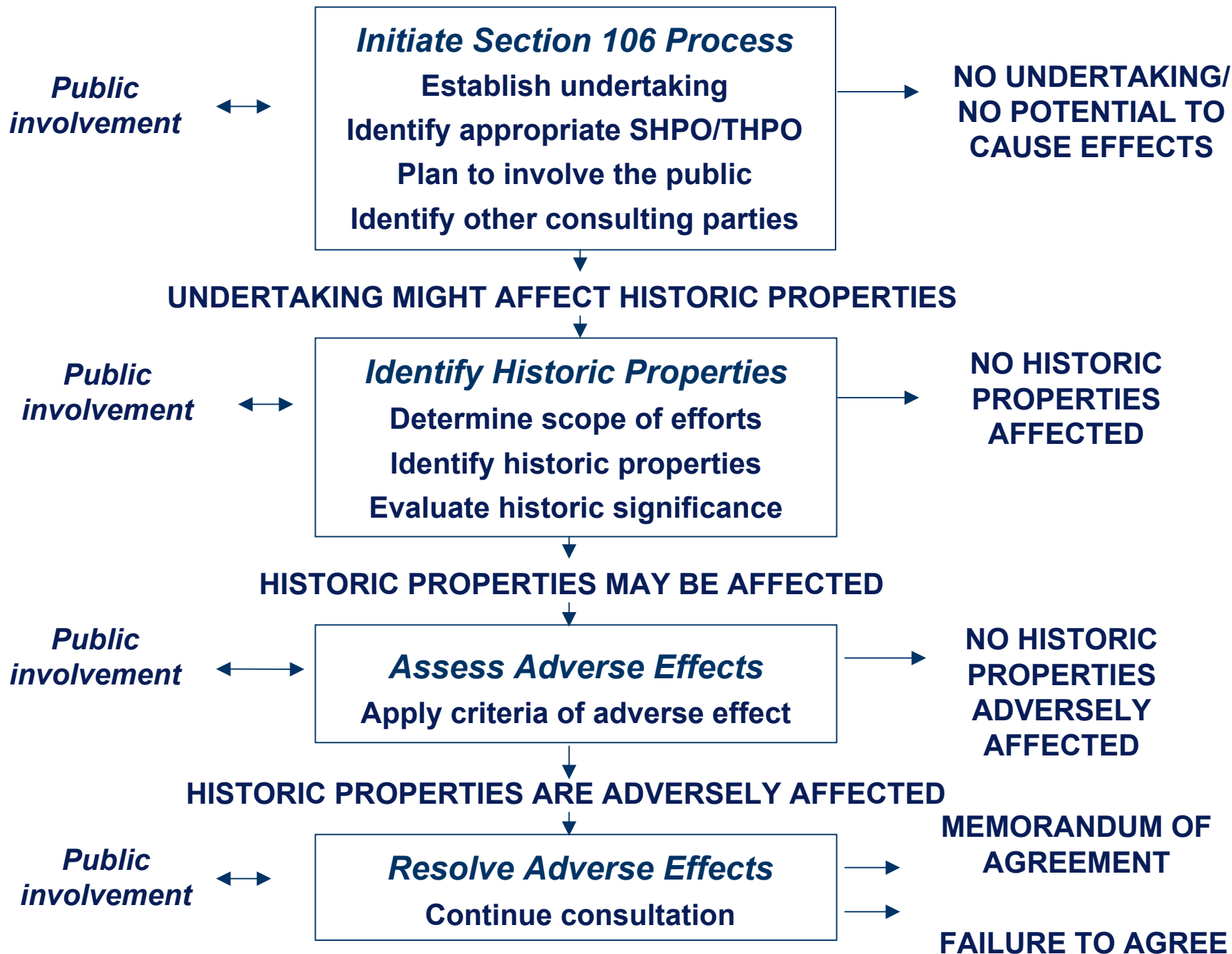


## Subpart b – The Section 106 process

- The current 36 CFR Part 800 is the fourth edition.
- Each revision has reduced the Councils role in the review of undertakings, recognizing the growing capability of agencies and participants in the process.



**[Section 800.3 - 13]**





# **Four Steps to Enlightenment**

**Step 1: Initiate**

**Step 2: Identify**

**Step 3: Assess**

**Step 4: Resolve**

# **STEP 1**

## **Initiate**

Establish undertaking  
Identify appropriate  
SHPO/THPO  
Plan to involve the  
public  
Identify other  
consulting parties

***Public  
involve  
ment***

***NO  
UNDERTAKING/  
NO POTENTIAL  
TO CAUSE  
EFFECTS***

**Historic Properties May be Affected**

# Establish UNDERTAKING

- ♦ Project, activity, or program under direct or indirect jurisdiction of a Federal agency
- ♦ Includes activities that
  - Are carried out by or on behalf of agencies
  - Received Federal funds
  - Required a Federal permit, license, or approval
  - Are regulated under delegated federal programs.

# Timing of Review

- ◆ Process must be initiated early in project development
  - Broad range of alternatives should be available for consideration.
  - GSA clients should be properly informed about consultation requirements
  - Realistic expectations concerning project schedules must be discussed.
- ◆ Section 106 must be completed **prior to**
  - Approval of the expenditure of Federal funds
  - Issuance of any license

# Determining Potential to Cause Effects

- ◆ Based on the potential of the undertaking as a type of activity
- ◆ Prospective- no need to know whether historic properties are present
- ◆ Knowledge about specific properties irrelevant. Assumptions about effect must be validated by proceeding review.



# Identify appropriate SHPO/THPOs



- ◆ Consult with your RHPO
- ◆ Never contact SHPO/THPO directly
- ◆ RHPO are responsible for maintaining working relationship with agencies.

# Involve the public

- ◆ Consult with RHPO
- ◆ Make documents, materials and other data available, to the extent possible, concerning the undertaking.
- ◆ Involve early so comments can be incorporated in GSA's consideration of alternatives.
- ◆ Provide adequate notification times.



# Identify other consulting parties

In addition to those already mentioned:

- ♦ **Local non-profit historic preservation organization**
- ♦ **State wide non-profit historic preservation organization**
- ♦ **National non-profit historic preservation organizations**
- ♦ **Other federal agencies**



# Determine scope of efforts

- ◆ The program responsible for the project or action shall notify the RHPO early in the project planning so that an appropriate identification study can be performed.
- ◆ Project schedule and scope of effort shall allow time for consultation w/shpo/thpo and representatives of native American groups.

# Determining the Area of Potential Effects (APE)

- ◆ APE is geographic area(s) in which undertaking may cause alterations in character or use of historic properties
  - Knowledge of historic properties not needed to establish the APE
  - APE should include all areas of potential direct or indirect effects
  - APE may include more than one area
- ◆ Agency consults with SHPO/THPO to determine the area of potential effects.



## In consultation with the RHPO Gather Information on Properties in the APE



- ◆ GSA is normally required to perform an evaluation study to obtain sufficient documentation to apply the criteria for evaluation to previously unidentified historic and cultural properties.
- ◆ RHPO will consult with SHPO/THPO

# No Historic Properties Affected

- ◆ Appropriate when
  - GSA has determined (through a consensus determination or determination by the Keeper) that no historic properties are present or
  - there are historic properties present, but the undertaking will not have any effect on them

# **“Historic Properties”**

***Properties included in, or eligible for inclusion in, the National Register of Historic Places.***

**The term “eligible for inclusion” includes both properties formally determined as such by the Keeper and all other properties that meet the National Register criteria.**



# The National Register of Historic Places

- ◆ The NRHP is a listing of districts, sites, buildings, structures, and objects significant in American History, architecture, archeology, and culture maintained by the Secretary of the Interior under authority of Section 2(b) of the Historic Sites Act of 1935, 49 Stat. 666, 16 U.S.C. § 462, and Section 101(a)(1) of the NHPA, 16 U.S.C. § 470a(a)

# Age eligibility

- ◆ National register criteria generally requires that a property be 50 years or older to be eligible for the NR.
- ◆ GSA has established a threshold of 45 years for assessing the eligibility of a property.
- ◆ GSA's intent is to prevent project delays and increased design and construction costs due to new compliance requirements affecting a project in development.



## Five Categories of historic properties as determined by the NPS:



- ◆ **Buildings**
- ◆ Structures
- ◆ Sites
- ◆ Objects
- ◆ Districts





# Five Categories:



- ◆ Buildings
- ◆ Structures
- ◆ Sites
- ◆ Objects
- ◆ Districts





# Five Categories:



- ◆ Buildings
- ◆ Structures
- ◆ Sites
- ◆ Objects
- ◆ Districts





# Five Categories

- ◆ Buildings
- ◆ Structures
- ◆ Sites
- ◆ **Objects**
- ◆ Districts



# Five Categories

- ◆ Buildings
- ◆ Structures
- ◆ Sites
- ◆ Objects
- ◆ Districts





# National Register Criteria

- A. Association with events
- B. Association with people
- C. Distinctive design/construction
  - Distinctive construction characteristics
  - Work of a master
  - Artistic value
  - A distinguishable entity
- D. Data potential





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  - A distinguishable entity
- D. **Data potential**





# Levels of HISTORIC SIGNIFICANCE



- ◆ NATIONAL
- ◆ REGIONAL
- ◆ LOCAL













# Elements of INTEGRITY



Properties must have integrity of (as appropriate)

- Location
- Setting
- Design
- Materials
- Workmanship
- Feeling and association



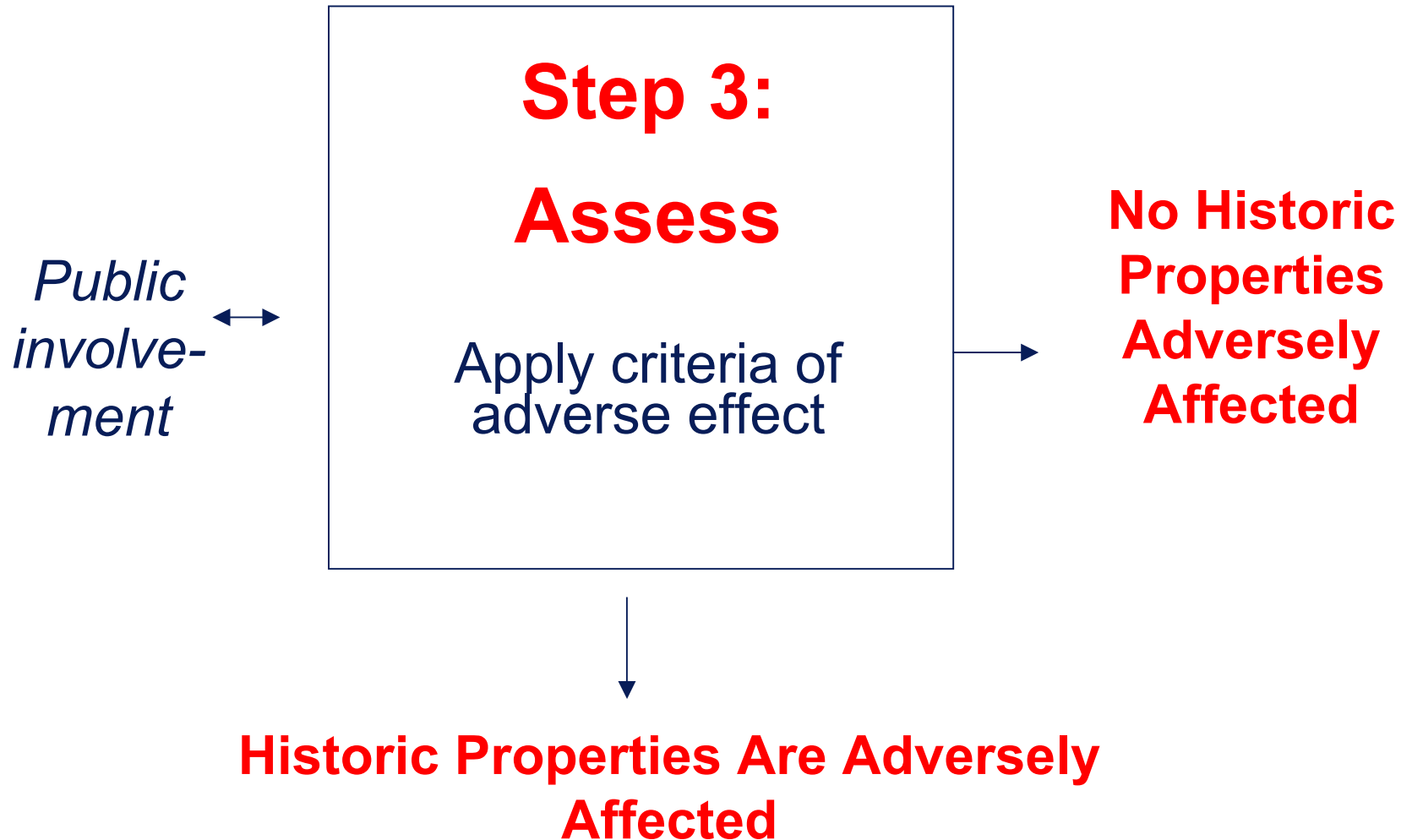
# “Reasonable and Good Faith” Identification Efforts

- ◆ Agency should take into account
  - Past studies
  - Magnitude and nature of the undertaking
  - Degree of federal involvement
  - Nature and extent of potential effects
  - Likely nature and location of historic properties
  - Applicable standards and guidelines
  - Confidentiality concerns



## GSA's Identification efforts

- ◆ Each GSA Region has a program to nominate eligible properties to the national register and to complete Bpps for register and register eligible properties under its jurisdiction, including leased buildings occupied by GSA.



# Adverse Effect (AE) Process

- ◆ Apply criteria of AE
- ◆ Agency must provide documentation to SHPO/THPO, consulting parties and make documentation available to public.
- ◆ SHPO/THPO or Council may comment within 30 days on agency's finding.
- ◆ If agency maintains its findings despite objections, Section 106 complete.

# Criteria of Adverse Effect

- ◆ Undertaking may:
  - alter characteristics that qualify property for the National Register
  - diminish the property's integrity
- ◆ Alteration may be direct or indirect
- ◆ Agency should consider:
  - All qualifying characteristics of the property and site
  - Reasonably foreseeable effects
  - Cumulative effects



# Examples of Adverse Effect

- ◆ Physical destruction or alteration
- ◆ Alteration inconsistent with the *Secretary of the Interior's Standards for Treatment of Historic Properties*
- ◆ Relocation of a property
- ◆ Changes in the character of a property's use or setting

# Examples of Adverse Effect (continued)

- ◆ Introduction of incompatible visual, atmospheric or audible elements (I.e. new construction)
- ◆ Neglect and deterioration
- ◆ Transfer, lease, or sale out of Federal ownership without adequate preservation covenants (I.e. disposal)

# AE Process

- ◆ Apply criteria of AE
- ◆ Agency must provide documentation to SHPO/THPO, consulting parties and make documentation available to public.
- ◆ SHPO/THPO or Council may comment within 30 days on agency's finding.
- ◆ If agency maintains its findings despite objections, Section 106 complete.

# Documentation for Findings of Adverse Effect

- ◆ Description of undertaking and APE, including photos, maps, and drawings as necessary
- ◆ Descriptions of affected historic properties and efforts to identify
- ◆ Description of effects and statement of why the criteria of adverse effect is applicable
- ◆ Views of consulting parties and public.

# Finding of no adverse effect (NAE)

- ◆ Appropriate when the agency:
  - Believes none of the undertakings effects meet the criteria of adverse effect; or
  - Modifies project or agrees to conditions of adverse effects

# AE Process

- ◆ Apply criteria of AE
- ◆ Agency must provide documentation to SHPO/THPO, consulting parties and make documentation available to public.
- ◆ SHPO/THPO or Council may comment within 30 days on agency's finding
- ◆ If agency maintains its findings despite objections, Section 106 complete.

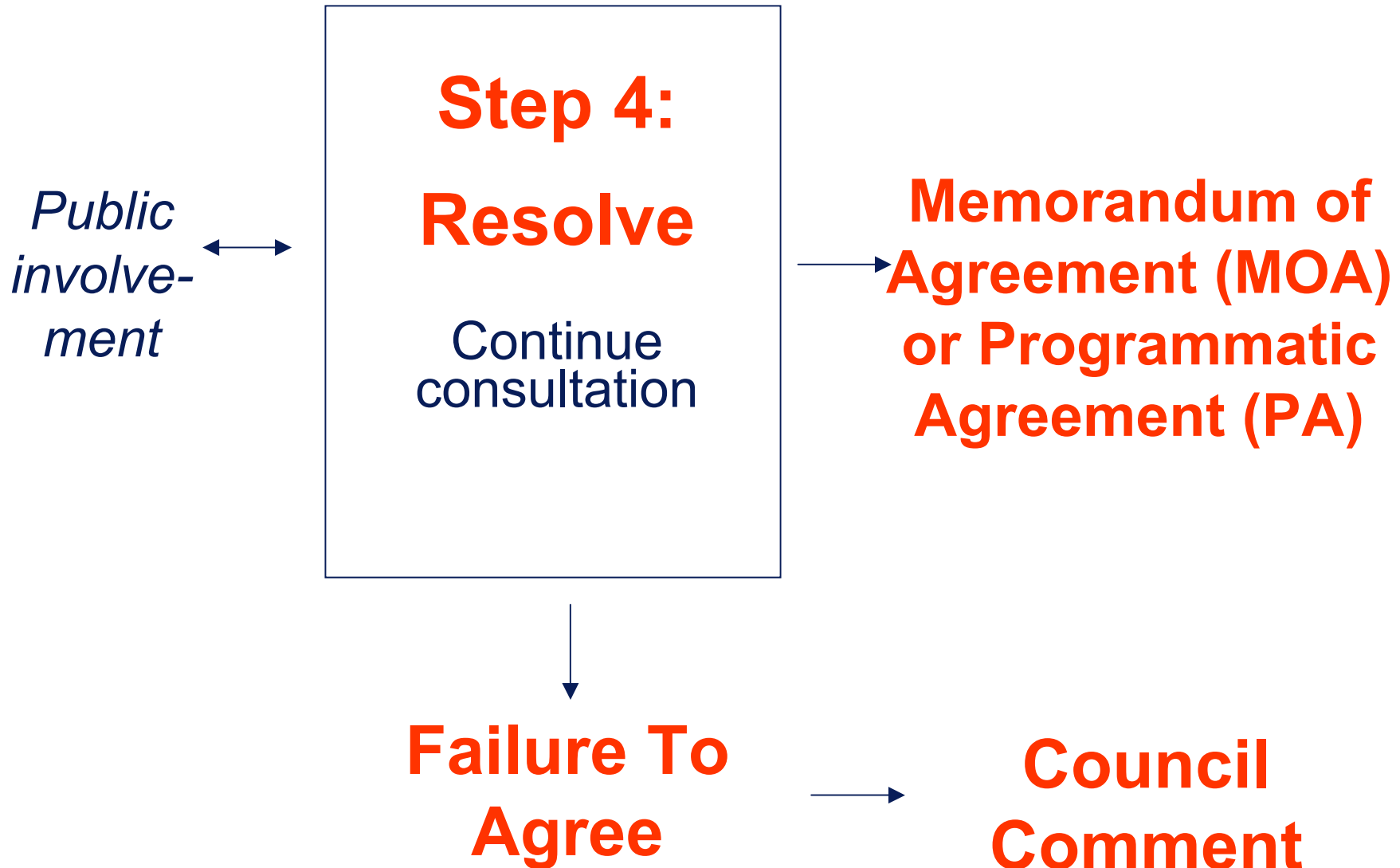
## Agency proposes finding of AE or NAE in consultation with the SHPO/THPO

- ◆ SHPO/THPO has 30 days to respond to agency findings.
- ◆ They may agree or disagree
  - If they agree with AE then Step 4 – Resolve is initiated.
  - If they disagree with AE then further consultation is needed.
  - If they agree with NAE then 106 is completed.
  - If they disagree with NAE then further consultation is needed.

# Disagreement on Findings of No adverse Effect

- ◆ Agency must consult if there is an objection with parties.
- ◆ resolve or refer the finding to the ACHP
- ◆ Council will decide whether to comment within 15 days.
- ◆ ACHP comments are not binding on the agency.  
But!!





# Process

- ◆ Notify Council
- ◆ Involve additional consulting parties/public
- ◆ Consider alternatives
- ◆ Prepare documentation
- ◆ Negotiate mitigation plan

# Notify Council

- ◆ Agency must notify the Council regarding undertaking.
- ◆ Agency must invite Council to participate when:
  - The agency wants council involvement
  - A NHL is adversely affected
  - A PA is proposed Council must comment within 45 days
- ◆ Council provides opportunity for input from agency, consulting parties, and the public
- ◆ Council members and the Chairman provide formal written comment to the head of agency.

# Criteria for ACHP Involvement

- ◆ Council is likely to enter a review when there are:
  - substantial impacts on important properties
  - important questions of policy or interpretation
  - procedural problems
  - issues of concern to Indian tribes and Native Hawaiian organizations



# Process

- ◆ Notify Council
- ◆ Involve additional consulting parties/public
- ◆ Consider alternatives
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# Involve additional consulting parties/public



Besides the SHPO/THPO and the Council, involve the parties previously identified in consultation.



# Process

- ◆ Notify Council
- ◆ Involve additional consulting parties/public
- ◆ Consider alternatives
- ◆ Prepare documentation
- ◆ Negotiate mitigation plan

# Consider alternatives

Project modifications  
can greatly assist in  
lessening AE

Supply as much  
information as  
possible to the  
Council on  
alternatives.







# Process

- ◆ Notify Council
- ◆ Involve additional consulting parties/public
- ◆ Consider alternatives
- ◆ Prepare documentation
- ◆ Negotiate mitigation plan

# Documentation Requirements

- ◆ Agency must give Council and consulting parties description of:
  - Undertaking and APE
  - Identification steps and affected historic properties
  - Project effects and why the criteria of adverse effects are applicable
  - Views of consulting parties and public.



# Process

- ◆ Notify Council
- ◆ Involve additional consulting parties/public
- ◆ Consider alternatives
- ◆ Prepare documentation
- ◆ Negotiate mitigation plan



# Examples of Mitigation Measures



- ◆ Alternative design
- ◆ Alternative location
- ◆ Limiting magnitude
- ◆ Rehabilitating some historic properties
- ◆ Planning for preservation and maintenance

# Examples of Mitigation Measures

(continued)

- ◆ Moving historic properties
- ◆ Marketing properties for donation, sale, or lease
- ◆ Documenting a historic property before destroying it
- ◆ Archeological data recovery

# Memorandum of Agreement

- ◆ Outcome of consultation when agreement can be reached
- ◆ Governs the undertaking and all of its parts
- ◆ Legally binding document
- ◆ Specifies agreed upon alternatives and/or mitigation
- ◆ Identifies parties responsible for implementing
- ◆ MOA and its implementation evidences agency completion of Section 106.

# Special Situations



# Foreclosure of Council Comment

- ◆ Agencies must complete Section 106 review prior to approving project
- ◆ Otherwise, Council may determine its opportunity to comment is foreclosed
- ◆ Foreclosure finding:
  - Goes from Council membership to head of agency
  - Signals that Council believes agency has violated law



# Subpart C – Program Alternatives



[800.14-16]

# Programmatic Agreements

- ◆ Special type of agreement either:
  - To implement an agency program or
  - To address adverse effects of complex or multiple undertakings
- ◆ PAs for complex or multiple projects
  - Develop like MOAs
- ◆ PAs for regional or national programs
  - Consultation required w/council, NCSHPO, SHPO/THPO and the public

# Post-review Discoveries

- ◆ Unexpected discovery of effects to historic properties after project work has begun:
  - Can be discovery of a previously unidentified property
  - Can be discovery of unforeseen effects to a known property
- ◆ Provisions to Address discoveries only apply if project previously reviewed



# Planning for Discoveries

- ◆ Agencies encouraged to plan for discovery situations
- ◆ If discoveries are likely, the Project's PA, MOA or no adverse effect finding must include process for dealing with discoveries.



# Planning for emergencies

- ◆ Agencies encouraged to develop tailored procedures for emergency response
- ◆ Must be developed in consultation with appropriate parties and approved by the Council in order to substitute for standards review process.

## ADVISORY COUNCIL ON HISTORIC PRESERVATION

*The mission of the Advisory Council on Historic Preservation is to promote the preservation, enhancement, and productive use of our Nation's historic resources, and advise the President and Congress on national historic preservation policy.*



Preserving America's  
Heritage<sup>sm</sup>


[About ACHP](#)

[ACHP News](#)

[National Historic  
Preservation](#)

### ACHP News

#### First Lady Laura Bush Announces *Preserve America* Community Designations, Presidential Awards

Laura Bush recently announced details of two new key components of the Administration's *Preserve America* initiative:



- The [Preserve America Communities designation](#) recognizes communities that protect and celebrate their heritage, use their historic assets for economic development and community revitalization, and encourage people to experience and appreciate local historic resources through education and heritage tourism programs.
- The [Preserve America Presidential Award](#) will be given annually to individuals, businesses, or organizations that have made significant contributions to the preservation of historic and natural heritage assets.

[Read more about the Preserve America recognition program](#)

[www.achp.gov](http://www.achp.gov)